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HOBBES AND THE DOCTRINE OF NATURAL RIGHTS: THE PLACE OF CONSENT IN HIS POLITICAL PHILOSOPHY

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IN THE HISTORY of political philosophy the notion of consent is identified prominently with the theory of Hobbes. Here it is usually said to function in two distinct but related roles: to identify that trait which confers legitimacy or authority on a government and to establish the principal ground of the individual citizen's obligation to conform to law.[1]

Thus we find Patrick Riley saying, "That consent, promise, and agreement, as the foundation of 'covenants' (contracts depending on trust), are fundamental in defining what Hobbes means by the political legitimacy of sovereigns and the political obligations of subjects, is scarcely open to doubt."[2] The crucial point, which requires emphasizing here, is that consent so conceived is said to operate through a social contract (or covenant) or a promise of some sort.[3] It follows then that the social contract or covenant constitutes the principal place at which consent has a role in Hobbes' theory.

I am inclined to dispute this particular and quite conventional reading of Hobbes. In my paper I would like to consider the various places at which consent might be located in Hobbes' theory and, briefly, to suggest anomalies that would arise in each case from such a placement. My object in all this is to show that Hobbes' principal and essential use of consent was *not* at the point of the social contract or of any putative promise of subjection and obedience. In effect I want to deny the bearing of the standard theory in the case of Hobbes, at least as regards the place(s) at which it has traditionally located consent.

There is, however, another role which the notion of consent has played that has, while not going unnoticed, been considerably underplayed. I have in mind the connection that exists, in the thought of Hobbes, between consent and natural rights. The latter part of my paper, then will be concerned with developing the importance of this particular connection.[4]

NOTE: An earlier version of this paper was presented at the VIth meeting of AMINTAPHIL (the American Section of the International Association for Philosophy of Law and Social Philosophy) at Amherst, MA, in March 1978; a much shorter version of the present paper was read at a session of the Hobbes Tercentenary Congress in Boulder, CO, in August 1979. I want to thank the General Research Fund of the University of Kansas for a grant (3120-2038) which supported the initial drafting of my paper. I am grateful to Karen Reeder Bell for bibliographic help.

[1] These are the principal functions of consent in what might be called the standard theory, as found, for example, in the recent studies by Harry Beran, "In Defense of the Consent Theory of Political Obligation and Authority," *Ethics* 87 (1977): 260-71, esp. pp. 260-61, 268, and A. John Simmons, "Tacit Consent and Political Obligation," *Philosophy and Public Affairs* 5 (1976): 274-91, esp. pp. 274, 281, 284, and 290.

[2] At p. 502 in Patrick Riley, "Will and Legitimacy in the Philosophy of Hobbes: Is He a Consent Theorist?" *Political Studies* 21 (1973): 500-522; see also p. 500.

[3] See ibid., pp. 502, 507, 515.

[4] My remarks are, however, somewhat conjectural; for Hobbes really had no explicit *concept* of rights. Rather, he tended to talk about a rather peculiar kind of right, called a natural right, and to identify one or more things (be it "self-preservation" or "a liberty to do anything") as a right of that sort. This he did without any prior analysis of just what a right is. Surprisingly, not many of the things written about Hobbes have addressed themselves to his theory of natural rights as their main topic. And these few have not been apt toward making the points I want to emphasize in this paper. The following are a representative sample: the papers by C. B. Macpherson ("Natural Rights In Hobbes and Locke," pp.

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We might begin by characterizing natural rights as the rights one has, or would have, in a state of nature. It is no accident that both Hobbes and Locke preface their discussion of natural rights with a word picture, and a rather striking one at that, of humankind's original condition. Hobbes, moreover, described this state twice over — or, better, described it in two different ways.

In the one, we consider men under certain *psychological* descriptions: they are "diffident" (or suspicious), proud, fearful, rational (i.e., calculative), self-preservative. In the other we consider these same persons, with these same traits, but this time under certain *legal* or, rather, legal-like descriptions: right, law, contract, and so on.

Here we are told that in a situation in which there were no overarching and enforceable rules of conduct, no common master, men would each follow a definite and singular policy. They would do anything to preserve their life and substance: that is, anything they were physically able to do, for there would be no "inner" constraint afforded by sentiment or by reason which could inhibit such a policy. Indeed, reason and feeling, when consulted and reflected on, would prescribe precisely such a policy. Here rationality is being used as a prescriptive notion, telling us what it is rational to do in a situation of a certain sort. Hence, one's natural liberty (i.e., one's conduct when freed from both internal and external restraint) would be fully licensed by reflective reason to do anything. This unrestricted liberty of each individual, in the state of nature, is his *natural right.*

Of course we are rationally bound not to do anything which harms our self-preservation. This Hobbes calls the *law of nature.* At first it might appear that natural right and natural law are two variant ways of saying the same thing. The one says you can and should do anything to preserve your self and substance (natural right or liberty); the other that you should do nothing that harms them (natural law or constraint). However, when we consider that a policy of unrestrained violence by all is itself inimical to the preservation of the life and substance of each individual, we see that natural law must inhibit natural right. Thus the solution to the threat to life and limb posed by a policy of violence, both preemptive and retaliatory, is to seek peace.

But how? We cannot change man's basic psychological makeup. Nor can men be expected to act irrationally. We must seek peace in the one way available: by altering the very conditions of the state of nature. For what makes the state of nature is not merely man's psychological constitution or his being subject to rational norms; rather, it is those things under conditions peculiar to the state of nature — that there are no overarching rules, no common master — which give rise to the characteristic imperatives on man's behavior in that state in the first place. So, although it is rational to act in the state of nature way under the conditions peculiar to that state, it is also rational to want to emerge from that state, to seek peace. The difference between these two rational perspectives, the first called natural right and the second natural law, is the difference between a short-term and a long-term rationality; it is the difference between a pattern of sensible behavior in a situation which is itself defectively rational and the pattern in a situation which, if achievable, would be maximally rational. So we must explore, at

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1-15) and Raymond Polin ("The Rights of Man in Hobbes and Locke," pp. 16-26) in D. D. Raphael, ed., *Political Theory and the Rights of Man* (Bloomington: Indiana University Press, 1967); the discussion papers on "Obligations and Rights in Hobbes" by D. D. Raphael (pp. 345-52) and Howard Warrender (pp. 352-57) in *Philosophy* 37 (1962); Ramon Lemos, "Two Concepts of Natural Rights," *Southern Journal of Philosophy* 12 (1974): 55-64, and Robert Paul Finch, "Defining 'Natural Rights': A Problem and Solution Considered," *Southern Journal of Philosophy* 13 (1975): 287-95 (a reply to Lemos).

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least in imagination, what it would take for men to live outside, to live beyond, the state of nature. That is, to live under the rational norms of the law of nature without the distorting effects of the wholesale exercise of natural rights.

For each man, the policy of violence, which is the natural right of each, would have to be totally and permanently renounced. Hobbes calls this *contract.* And such a contract can, he believes, make sense only where it can be maintained and enforced. Hobbes next argues, and here I anticipate a bit, that any such contract must be validated or made effective — such a policy made rational — by a particular kind of agency, absent by definition from the state of nature situation. Such an agency would make and enforce overarching rules so as to inhibit violence and allay the wary scepticism that each man has of the others' intentions and capacities.

In short, individual persons "make" the contract with each other. That is, they see that these terms make sense and act as if the terms of total, permanent, and mutual renunciation of first-strike violence were a general policy. Government, while not a party to this contract and hence not to these terms, exists to maintain that policy.

Individual consent, interestingly, does not enter the picture of the state of nature. We do not in fact consent to the depredations of others, nor they to ours. Our tendency, like theirs, is to resist. The natural right of each individual is simply determined by a rational norm: such a right is for each person a given in that it merely conforms to and exemplifies a rule. What does follow from the rule of reason, insofar as it is domesticated to the state of nature, is not that anyone *consents* to any depredation but, rather, that any depredation is rationally licensed in these circumstances. We can kill another or be killed; rob another or be robbed. Indeed, we should strike first: it is rational to do so. It is rational for everyone to do so.

We cannot expect the willing cooperation of others to be our victims. We can, of course, be philosophical about the matter: the psychological traits are the same for all, and the condition of life; the unending and boundless depredations on life and limb and holdings are rationally licensed for all men. We all live by the same rules. We give no quarter and expect none. That one might consent to all this, on some principle of tit for tat, and enter these lists willingly and even enthusiastically is merely incidental. For what matters is the rational policy or rule itself. Consent has no independent role: the rule, if embraced self-consciously, is embraced simply because it is a rational rule. We do not so much consent to it as *recognize* its force. The rule is rational whether we affirm it, or decide it by reflection, or not.

Consent is wholly immaterial. For, ultimately, what makes the policy of violence viable is the psychological traits that we have, under the conditions in which we have them. And if we would know the reason of this policy, then rational reflection shows that it is reasonable for all to practice first-strike violence — given these traits, alike to all, and our common condition.

Indeed, it is misleading even to say that men consent to the terms of the contract. Again, what we do is see their rational force: we see that the policy of first-strike violence, though it makes sense under state of nature conditions, is itself inimical to the preservation of the life and limb, to the substance of each and every one of us. It would be rational to act otherwise, if we could. But just as we do not consent to the conditions of the state of nature so we do not consent to changing them, if we can. We merely say that were it possible to change them, thereby bringing some degree of peace and order into life, we should (*rationally* should) do so.

Hence, it is premature to say that any one individual consents, or should consent, to the terms of the contract. If he did, he would renounce the policy

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of violence and immediately be done in by one of the others. No, all must consent to the terms simultaneously. But even if all came to recognize the rational force of such terms, that in itself would not suffice to have peace. Rather, all must agree to be under a contract-enforcer. And beyond the rational recognition of a need for a contract-enforcer what is required is that there must actually be one, an agency empowered to and powerful enough to hold men to account. So, if men can be said to consent to anything, it is this: to be under such an agency in order that the terms of the contract, recognized as rational, can be maintained. And so to agree — or, rather, so to be — is *ipso facto* to alter the basic condition from a state of nature to one of civil society.

Peace is the rational end, government the indispensable and rational means to that end, even where it achieves that end only imperfectly.

One might say then that men consent to be under a contract-enforcer (or a government, as we conventionally call it). But this can amount to saying merely that men are in fact under *some* government — and can reflectively see that this should (rationally should) be so. As a doctrine of consent this one is exceedingly thin. Men can be said to consent to be under government, really, only when they are actually under one. And the mere fact that anyone is effectively under some particular government is sufficient to say that he has consented so to be.

The Hobbesian doctrine I have just identified is strikingly prefigured in the famous "dialogue" between Socrates and the Laws of Athens in Plato's *Crito*. At one point Plato has the Laws assert,

> Yet we proclaim that if any man of the Athenians is dissatisfied with us, he may take his goods and go away wherever he pleases; we give that privilege to every man who chooses to avail himself of it so soon as he has reached manhood, and sees us, the laws and administration of our state. . . . But we say that every man of you who remains here, seeing how we administer justice, and how we govern the state in other matters, *has agreed, by the very fact of remaining here,* to do whatsoever we tell him.[5]

The question of a determinate age limit strikes me as crucial in the *Crito;* it seems to be part of the logic of the main argument that an "agreement" is

[5] At pp. 61-62, italics added, in Plato, *Euthyphro, Apology, Crito,* tr. by F. S. Church; 2d ed. (New York: The Library of Liberal Arts, 1956). For those interested in the details of this exchange between Socrates and the Laws, I would suggest a reading of the relevant part of the *Crito* (ibid., pp. 60-65). I have argued elsewhere that Socrates should here be taken as saying that, where a man cannot dissuade the author of the law from putting it into effect, then he *must* obey the law. (See "Socrates on Disobedience to Law," *Review of Metaphysics* 24 (1970): 21-38; for criticisms see F. C. Wade, "In Defense of Socrates," *Review of Metaphysics* 25 (1971): 311-25, and Daniel M. Farrell, "Illegal Actions, Universal Maxims, and the Duty to Obey the Law: The Case for Civil Authority in the *Crito*," *Political Theory* 6 (1978): 173-89.) Many writers, of course, have rejected the view that Socrates advocates an absolute obligation to obey the law. They do so largely by drawing on statements made by Socrates in Plato's *Apology.* The best essays in defense of this position are Wade's paper, A. D. Woozley's "Socrates on Disobeying the Law," in Gregory Vlastos, ed., *The Philosophy of Socrates: A Collection of Critical Essays* (Garden City: Doubleday Anchor Books, 1971), pp. 299-318, and G. Vlastos, "Socrates on Political Obedience and Disobedience," *Yale Review* (Summer 1974): 517-34. For criticisms of the papers by Woozley and Vlastos, see J. Peter Euben, "Philosophy and Politics in Plato's *Crito*," *Political Theory* 6 (1978): 149-72, esp. pp. 150-56. In addition interesting studies focused on the rhetorical character of the *Crito* have been published, most notably by R. E. Allen, "Law and Justice in Plato's *Crito*," *Journal of Philosophy* 69 (1972): 557-67, and Gary Young, "Socrates and Obedience," *Phronesis* 19 (1974): 1-29. For criticisms of Young, see Euben, pp. 156-59, and Robert J. McLaughlin, "Socrates on Political Disobedience," *Phronesis* 21 (1976): 185-97. The discussion of Socrates' position has begun, of late, to grow into a literature of some proportion. Among the more recent pieces the essays by Farrell, McLaughlin, and esp. G. G. James, "Socrates on Civil Disobedience and Rebellion, *Southern Journal of Philosophy* 11 (1973): 119-27, might prove helpful in providing some overview.

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struck by the mere fact of residence *after a certain point.* Moreover, this Socratic notion of "agreement" bears a remarkable resemblance to Hobbes' idea of "subjection" through a tacit promise and Locke's doctrine of tacit "consent" (or at least one aspect of that doctrine). In each case one makes an "agreement" to accept the laws by the mere fact of staying in a commonwealth.

In Locke, as with Socrates, the "agreement" is struck by the mere fact of staying on after the "Age of Discretion," as Locke has it. But in Hobbes the crucial consideration is not age per se but, rather, the fact of open residence: "[Y]et if he lives under their protection openly, he is understood to submit himself to the government [as though by a 'tacit' promise]."[6]

I think it significant that for Hobbes the consent required to be subject to a particular government is normally given tacitly, or "in effect." This is clear in the two principal cases Hobbes had in mind, where the promise-act in one is open residence and in the other surrender to a conqueror to avoid being killed. Here the real difference between Hobbes and Socrates, and later between Hobbes and Locke, comes out: for Hobbes an act of promising can be forced or coerced without losing its validity. Now one could call such a forced act a promise, even a valid promise, but to say that it represents "consent," and thereby something one has agreed to and hence that one is obliged to, seems to invest the matter with more moral freight than it can carry. Indeed, insofar as this curious claim is taken to be the heart of Hobbes' doctrine of consent, it is so far from consent (or promising, as he actually calls it) in any standard or paradigmatic sense that one hesitates to grant the name.

Be this as it may, in this paper I am not concerned with what is to count as consent, that is, by what sign(s) it is given; here the principal issue to be addressed is not *how* one consents but *what* one consents to. For Socrates it was, or so the Laws assert, "to do whatsoever we tell him." But this is too stern; so they soften a bit: it is that one agreed to abide by the rule "either to obey us or to convince us that we were wrong," say the Laws.[7] For Hobbes the answer is not significantly different: we must let the government set the standards (the rules of conduct) to which we each and all adhere.[8]

But the route by which Hobbes got to this answer would be dramatically out of character for a Socrates. And here the peculiar flavor of Hobbes' own account begins to emerge. I have in mind his discussion of "representation."[9] The essential point which emerges in this discussion is that each member of a commonwealth must authorize "all the actions and judgments" of the representative and sovereign agent "in the same manner, as if they were his own" and authorize them, as it were, in advance.[10] It follows from this, Hobbes argued, (a) that "every particular man is author of all the sovereign doth: and consequently he that complaineth of injury from his sovereign, complaineth of that whereof he himself is author. . . ."[11] and (b) that "nothing the sovereign representative can do to a subject . . . can properly be

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[6] See Hobbes, *Leviathan,* "Review and Conclusion," for the passage quoted, which should be taken in conjunction with the argument of chs. 14-20, and Locke, *Two Treatises of Government,* ed. by P. Laslett (New York: New American Library, 1965), ch. 8 of the *Second Treatise,* pp. 374-94, esp. pp. 391-92.

[7] *Crito,* p. 62.

[8] See *Leviathan,* ch. 20, p. 136, and ch. 21, p. 138. Note: where page numbers are given, the reference is to the text edited by M. Oakeshott (Oxford: Basil Blackwell, 1957).

[9] See *Leviathan,* ch. 18, p. 113.

[10] Ibid.

[11] Ibid., ch. 18, pp. 115-16.

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called injustice, or injury; because every subject is author of every act the sovereign doth. . . ."[12] The sovereign's acts are always authorized for his subjects; and no one of them can ever urge, as a ground for disobedience, that laws are unjust.

Putting this in the language of consent, we could say that one consents (in advance) to whatever the government might do. Hence whatever it does and no matter to whom, it is *authorized* by each and all so to act and indeed authorized by that very person to do that very thing. It is *carte blanche* authorization: by everyone for anything. Hence, no person can ever complain of *injustice* against the government.[13]

Hobbes' doctrine here concerns not harm (or "iniquity") but, rather, injustice (or "injury," as he often called it). Its basis, seemingly, is that no one can do injustice to himself. Thus, when we take any act of government as something one does himself, then when it is done *to* any person, it is in effect done by that person and hence cannot be an injustice to him.

There does appear, however, to be a serious gap in Hobbes' account insofar as we are concerned with complaints of injustice. For even though the victim of the harmful act cannot complain of an injustice, it is quite possible for others to do so. For it is not inconsistent to say that this act of government, which I have authorized and of which I am author, is unjust. That is, it is not inconsistent to the extent that I could describe my own act toward another as unjust. The attempt by Hobbes to block this moves takes us, I think, to the very heart of his peculiar doctrine of consent. For it is at this point that he is able to coordinate that doctrine with his theory of justice, the last and most important of the legalistic terms in the lexicon whereby he describes the state of nature.

There is subtlety in Hobbes' doctrine of subjection, by which I mean the consent given in the very fact of open residence to be subject to government, that has not yet been noted. Hobbes talks of consent or of promising in this context, but either term bespeaks, we've already noted, a notoriously passive deed. What does one *do* besides reside openly — which is, after all, something one would do even under conditions of coercion or duress? Or, to use his other favored example, is there anything done besides simply yielding to a conqueror? Is there, so to speak, an *act* of consent? Something positive and unmistakable, whether internal or express, that one does?

We can take it as settled that for Hobbes a government must be constituted by somebody: be it one person or a few or the whole body of citizens. We might recall, then, that Hobbes considered only the first and the third

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[12] Ibid., ch. 21, p. 139.

[13] The premier study of Hobbes on authorization is Hannah Pitkin, "Hobbes' Concept of Representation," *American Political Science Review* 58 (1964): 328-40 (Part I) and 902-18 (Part II), reprinted with revisions in Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), ch. 2, pp. 14-37. Her account has been cogently criticized by Clifford Orwin, "On the Sovereign Authorization," *Political Theory* 3 (1975): 26-44 (see ibid., pp. 45-52 for Pitkin's reply). In addition, Orwin (nn. 1 and 2 on pp. 40-41) provides a useful survey of the literature on representation/authorization. My own account differs from both Pitkin and Orwin principally in its treatment of the theme of injustice in Hobbes (see esp. Orwin, p. 33); indeed, one could say that this theme plays a minor or even a negligible role in their two accounts, which are focused primarily on the issue of obligation and secondarily on accountability. Moreover, I regard authorization not as the "substance" of the contract (Orwin, p. 27) or as "replacing" it (Pitkin, 1964, p. 908) but, rather, as belonging to the logically distinct dimension of *maintaining* the contract. Finally, I would argue that the substance of authorization (i.e., its operational equivalent) is found in that peculiar consent of the subject to the sovereign's exercise of natural right, an issue taken up later in this paper (and treated there, I would add, differently from Orwin [note his pp. 30, 34] or from Pitkin, who does not treat the subject at all in the precise form I take up in my paper).

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cases as serious possibilities and opted for monarchy on probabilistic grounds, as opposed to demonstrative ones. Let us suppose then that the power of government is lodged in the hands of one man. So my consent to be under government amounts to my consent to be subject to this particular man.

We should not become confused at this point: consent to a particular government in no way requires that it be elected, though in fact it might have been. Indeed, no procedure of selection is contemplated here at all. It is acknowledged, moreover, that most lines of government are not so much instituted as imposed and that it is no different with any particular government. For Hobbes there is no real difference between choosing or electing a particular government and merely perceiving or recognizing that somebody in particular is the government. Hence, Hobbes tended to treat on an equal footing a government instituted by covenant and selected by the majority, one under which the citizens merely resided openly, and one to which its subjects had yielded on pain of death or ruin as to a conqueror. The sign(s) of consent might differ in each case, but the ensuing subjection was identically the same in all. For in all such cases, whether elective or imposed, one could be said to consent to that particular person, or body of persons, as the government. It is, when all is said and done, a matter of rational necessity: on the grounds that someone must be the government and that any government, even a hurtful one, is better than no government at all (as we find it, paradigmatically, in the anarchy of the state of nature).

So I consent to someone in particular as the government to which I am subject, and do this simply by recognizing or perceiving that this someone is sovereign and that I am resident in his domain. How is this any different from the account we went through earlier? There we said that one's act of consenting to be subject to a government amounts to open and continued residence in a given domain; now we say that this same act of consent is to be taken as subjection to someone, some person(s), as the government. We have, seemingly, merely personalized government a bit by saying that it must always be a particular government and that this in turn must always be a government by somebody. What change does this personalizing element introduce?

Look at it this way. I and a lot of others are subjects. Somebody else is the government. Basically, government is the rational means to enforce the rational end of civil association (peace). And peace, in effect, is just the keeping of the terms of the contract, terms which mandate a complete, mutual, and permanent renunciation of a policy of boundless and unending violence. No such contract is valid unless it makes sense to keep it — which requires that its terms can be maintained and enforced. And here government enters as a means to that end. What a valid contract then would entail for me and everyone else as well is that each one of us gives up the policy of first-strike violence on which we operated in the state of nature. My license, and that of others, to do just anything has been renounced. But what about that person (one person, for the sake of emphasis) who is the government, the contract-enforcer?

For him it is quite another matter. He hasn't given up that policy; his license to do just anything is still intact. With regard to me and all the others that person is still in the state of nature and his right is simply a *natural right.* I don't mean to suggest that the governmental person will actually regard himself as still in a state of nature in any full-blooded sense. For, certainly, he will perceive the docility of his subjects; he will not perceive them as a threat to his life or limb or substance. He will not feel psychologically driven then to act as a wolf toward them in anticipation of, or response to, their

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wolfishness. Nor would he, reflectively, regard it as rational so to act. But he is, nonetheless, in a state of nature as regards his natural liberty: he has not surrendered the license to do *anything* he is physically able to do. Though his expectation respecting others may be different from that of *homo lupens,* his license to act towards them is no different. That has not been altered: he can still do, so far as he is able, as he wills. We might describe this, then, by saying that his legal status, but not his psychological state, is that of someone in the state of nature. This is, of course, to look at things from the sovereign's perspective.

From my perspective and that of all other subjects, I am not in a state of nature. Each of us had stood aside, renouncing or laying down the policy of first-strike violence.[14] We have each voluntarily (but not capriciously) terminated our natural liberty, our license to do anything, and thereby put in abeyance our natural rights. The government may be, but only in a specific way, in a state of nature toward its subjects but they are not in a state of nature toward it at all or, more important, toward each other.

So we can say that the state of nature as originally described has ended. Men are now in civil association, but there is and must be an element, an unresolved residue, of the state of nature even there.

In civil society, as I have just described it, the subjects do not so much *author* (or authorize) what the governmental person does as stand aside to let him do it. If there is a doctrine of consent in Hobbes' political philosophy, it comes at precisely this point: at the point of voluntarily standing aside, of giving up the policy of first-strike violence by deferring to government.

Let me add, parenthetically, that this point bears in an interesting way on one of the focal topics in recent contract theory scholarship. For the question has been raised whether consent is properly to be conceived as "hypothetical" or, alternatively, as "actual." This particular distinction has attained considerable prominence from Hannah Pitkin's study of Locke.[15] And contrasting views of consent and of the social contract, along the lines indicated by this distinction, have surfaced in contemporary Hobbes scholarship.[16]

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[14] Hobbes' terms, *standing aside* and *laying down,* and his discussion of them can be found in *Leviathan,* ch. 14, p. 85, and ch. 28, p. 203.

[15] See her "Obligation and Consent," pp. 45-85, esp. pp. 57, 62, in P. Laslett et al., eds., *Philosophy, Politics, and Society,* 4th series (Oxford: B. Blackwell, 1972), reprinted with slight amendments from *American Political Science Review* 59 (1965): 990-99 (Part I), and 60 (1966), 39-52 (Part II). The distinction has been canonized, as regards the venerable notion of social contract, in John Rawls' prestigious book *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

[16] For example, George Sabine says the contract is for Hobbes a "logical fiction" (*History of Political Theory,* 3d ed. [New York: Holt, Rinehart, and Winston, 1961], p. 468), a view shared by Warrender (*The Political Philosophy of Hobbes: His Theory of Obligation* [Oxford: Oxford University Press, 1957], pp. 237-42, esp. p. 242). And more recently this same point has been made, as regards individual consent to the social contract, by Alan Zaitchik in his "Hobbes and Hypothetical Consent," *Political Studies* 23 (1975): 475-85, esp. pp. 480, 485. The alternative view, that individual consent and the so-called social contract should be regarded as in some sense actual or historical in character, was apparently widely held in Hobbes' day (see Gordon J. Schochet, *Patriarchialism in Political Thought* [Oxford: B. Blackwell, 1975], pp. 8-9, 180, 225-43) and in the eighteenth century (e.g., Vico). As regards Hobbes it has been espoused recently by Schochet (see ibid., esp. pp. 233-36) and, among several others who unself-consciously assume this to be the correct reading, by Claude Ake, "Social Contract Theory and the Problem of Politicization: The Case of Hobbes," *Western Political Quarterly* 23 (1970): 463-70, esp. p. 463. Rawls, however, continues to be the most prominent spokesman for the view that the traditional doctrine of social contract (held, he says, by Locke and Rousseau, among others) was that it was actual or historical in character. (See here his "Justice as Fairness," *Philosophical Review* 67 [1958]: 164-94, esp. pp. 178, 192.) Only Kant, among the major contract theorists, is explicitly

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My view is that whether consent is to be regarded as hypothetical or as actual depends on where, principally, one locates consent in Hobbes' theory. If consent retains its traditional attachment to the social contract (or to the "tacit" promise of subjection), then just insofar as the contract is taken to be a hypothetical construct so consent will be regarded as hypothetical rather than actual. However, if one shifts the focus of consent, as I have attempted to do in this paper, the matter could and probably will stand substantially differently. Accordingly, though I do regard the social contract to be for Hobbes merely hypothetical (an "idea of reason," in Kant's term), I do not regard consent, when focused specifically on the point of the renunciation of one's natural right of first-strike violence, as being similarly a mere hypothetical construct.

The renunciation here envisioned is not a psychological or a logical fiction. This business of *standing aside* in deference to the sovereign is actual in Hobbes' view; it is a matter of forbearing. It is not, however, properly described as historical in character, where "historical" has the sense of something done at some time, or by some people, in the past. It is, rather, a standing rational commitment and hence psychological dispostion, a "constant will," on the part of each and every subject. Or, to put the point more precisely, the subject's standing aside represents, on his part, a constant or perpetual waiving of his natural right.

Whether one wants to call any of this a matter of consent is a nice question.[17] I would think that, from a psychological point of view, it perhaps is not consent; for we do not normally take the mere fact of voluntary restraint as equivalent to consent. But from a normative, especially a legal, perspective such restraint could more readily be described in this way and would be, where that restraint, that "standing aside," was taken as the waiving of a right. For one normally does regard the conscious or conventional waiving of a right as consent.

More important, we have in Hobbes' doctrine of standing aside, when combined with the claim that this holds for the subjects but not the sovereign, the answer to the question of why subjects cannot ascribe injustice to the acts of the sovereign. The sovereign as regards his natural liberty and vis-à-vis each subject is still in the state of nature. No individual, respecting an exercise of a natural right, can complain of any harm done to himself (or another) as an injustice. Why not? Because, in the state of nature there is neither justice nor injustice. Or to put it another way, the exercise of one's natural right, to do anything, can be judged neither just nor unjust. It may be right, but this is only to say that it isn't wrong. Here to do something by (natural) right is not to do it out of justice. Such a course of action is not wrong, mind you, but that is because the language of justice is neither here nor there. Beyond this one point, that the thing is not wrong, *right* can only mean prudent of efficacious or efficient or rational. So then, no one can describe the act performed in the state of nature as unjust. Hence, so far as the sovereign is concerned, all his acts, being exercises of natural right, are not-unjust and no person can describe or complain of them as unjust.

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exempted from this reading by Rawls (1958, p. 193 n. 23; 1971, p. 12n). In a later essay Rawls distinguishes *as-if historical* from *as-if non-historical* processes. In each case the process is a hypothetical one, but in the former case it is still conceived as a process that *could* have occurred. Rawls' current instinct, apparently, is to treat the Hobbesian or Lockean social contract as the end point of a hypothetical but *as-if historical* process. (See John Rawls, "The Basic Structure as Subject," in A. I. Goldman and J. Kim, eds., *Values and Morals* [Dordrecht, Holland: Reidel, 1978], esp. pp. 68-69 and p. 70 n. 6.)

[17] For a sample discussion see G. Parry, "Performance Utterances and Obligation in Hobbes," *Philosophical Quarterly* 17 (1967): 246-52, esp. p. 252.

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It is, I think, remarkable that Hobbes, one of the founders of the contract theory and still one of its presiding geniuses, used this theory not so much to establish the principles of justice as to establish the principles of non-justice. The contract theory in his hands was used to determine what was *immaterial* to justice, for his concern was principally with the domain of that which was neither just nor unjust. This provides, I think, an interesting contrast to certain more recent efforts, in particular, that of Rawls, to use the theory to establish principles of justice, as distinguished from injustice, to determine the morally just as opposed to the morally unjust.

There is, of course, a clear sense in which Hobbes has a theory of justice. Under the sovereign there can be justice in the relations of the subjects to one another. His will, as to what subjects should do, is a rule of justice. And that same will, as to what subjects are forbidden to do, establishes a rule in effect stating what it would be unjust to do. But note that the injustice here is not the doing of something wrong to another but, rather, the doing of wrong under the sovereign's rule. It is the breaking of his rule that makes the wrong. Justice, by the same token, is the doing of what his rule enjoins. And where there is no rule, either to command or to forbid, the individual's act while not just cannot be unjust; it is described as *permitted* by the sovereign.[18]

But of any rule itself, just as of all the other acts of the sovereign, there is properly no talk of justice or injustice. Hence, we are unable to complain of a law, as of any other of the sovereign's acts, that it is unjust. There may be other ways in which we can judge of it: that it is or is not conducive to civil peace, that it serves or does not serve the end for which government is set up. But a sovereign rule is an exercise of natural right and thus cannot belong to justice but, rather, only to non-justice and in that specific way it can never be wrong.

My argument, to sum up provisionally to this point, has been that the doctrine of consent in Hobbes amounts fundamentally to consent to be under government, where government is conceived as a rational means to a rational end and where government is always said to be constituted by someone in particular. I have tried to show that how this consent is given — whether by open residence or by submission to a conqueror — is not the essence of Hobbes' theory of consent and that, if it were, the theory would be at best paradoxical and at worst merely Pickwickian. Rather, the essential point is what one is said to consent to. Each person, as subject, voluntarily consents to stand aside, that is, to renounce his policy of first-strike violence, his natural licence to do anything, vis-à-vis that person who is the sovereign. Hence the sovereign is and remains someone whose liberty to act, with respect to his subjects, is still in the state of nature, though they, of course, toward the sovereign and toward each other are not similarly located.

The upshot of this curious convention is that the conditions of the state of nature carry over in a certain respect but only unilaterally as between the government and its subjects.

The power of government is not something to be settled at a constitutional convention; it is decided at the very outset. Government can do *anything* by virtue of the retention by the governmental person(s) of the right of the state of nature. This power is not conferred, for it is already there in what is called natural right. This right merely carries over into the civil condition. All governments have the same power whether they be elective or not, or whether they be a government by one man or by many or even by all.

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[18] *Leviathan*, ch. 21, pp. 139, 143.

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Governments all have the *same* power, whether they use it ill or well, to serve this end or that.

By standing aside, we author each act of government: not that we *do* it virtually or in effect or that we *will* it. Rather, by standing aside we voluntarily allow the exercise of what we know to be a wholly unlimited power. Consent here does not confer the power but only allows it. We authorize each act of the sovereign as *de jure,* as coming under a rule of reason that we acknowledge and that defines (in the state of nature) appropriate conduct.

Governments can do anything. And nothing they do can ever be wrong, in the sense of unjust. Consent does not make either of these things so. Both are so by reference to a prior theory of natural right — with the added claim that governments are to be conceived as remaining, with respect to their liberty of action vis-à-vis their subjects, in a state of nature. That Hobbes regarded such liberty as both necessary and rational for the sovereign in a civil association is, I think, evident from the text of *Leviathan.*

One further refinement remains to be made. For it is not the case that the subject, in standing aside, permits or acquiesces in everything government might do. He may authorize it inasmuch as he recognizes it as rational; he may be unable to call it unjust. He may even be unable to stop it. But he does not have to like or even comply with it. This is so because Hobbes did allow for a narrow range of cases in which, even though the law was not unjust, it was "right" to disobey the law, the "right" in question being neither political nor moral but a "right of nature," the right of self-preservation.[19] I have in mind such cases of resistance as immediately involve, in Hobbes' words, "death, wounds, and imprisonment."[20] Thus any one might resist being executed, might flee the scene of battle though commanded to stay, or might refuse to give testimony which could be self-incriminatory and hence punishable.[21]

What we have in these cases is a conflict of natural rights between the sovereign, whose act is authorized *by all* as reasonable and in any case never unjust, and the subject whose act clearly serves to preserve his life and limb. The action of neither one here is unjust; for in each case, the agent is, respecting the other person, regarded as being in a state of nature situation. That the subject no longer is willing to stand aside, no longer allows (or permits) the sovereign his way, is immaterial from the perspective of rights. The sovereign does not have his rights by conferral; consent is no part of his actually having them or of an understanding of what it is that he has. Nor does the subject have the right he exercises by action of the sovereign. The natural rights of each antedate the social contract and depend in no way on the consent or recognition of any other person.

The sovereign cannot be said to gain anything, or lose it, respecting his natural rights by reference to the so-called consent of the subject. Nor can the subject be thought to gain or lose by its withdrawal. All that changes is what the subject is willing to *allow.* What the sovereign wants to do is as authorized without the subject's consent as it was with it; for it is authorized by a rule of reason, insofar as such rules can be said to operate in state of nature conditions. The only change is in the subject's willingness to *exercise* his right (of nature) against the sovereign. Thus Hobbes, unlike Socrates, does not teach the hard doctrine that accepting-by-staying entails the rule: if one cannot dissuade then one must obey. Indeed, he provides his own reasons, those of self-preservation or natural right, against this rule.

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[19] See ibid., ch. 21, pp. 141-43.

[20] Ibid., ch. 14, p. 91.

[21] See ibid., ch. 14, pp. 86-87, 91-92, and ch. 21, p. 142, for these examples.

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But is Hobbes actually being consistent at this point? Most theoreticians, seizing on Hobbes' own language, have contended that he regarded the subject's natural rights as somehow renounced or transferred in every case where it is proper to speak of sovereign and subjects. The standard view is that all natural rights have been transferred to the sovereign, at least in the sense that only he has such rights at his disposal; the subject, simply in virtue of being subject, does not.[22] Now, it would appear that the very sorts of conflict situations we have just been describing do fall under this standard view. If this is so, it becomes difficult to see how so-called natural rights could be called upon by subjects at all, let alone used *against* the sovereign. Once renounced, those rights would no longer be available to the subject; when transferred, they would be the sovereign's and his alone. Or so it would seem.

Even on the most generous of readings, then, a question remains for Hobbes whether one can transfer one's natural rights to the sovereign without alienating them entirely. As providing the best Hobbesian answer to this question, Morton Kaplan is on the right track, I believe, when he says that we are really concerned here, not with a right proper, but with its *exercise*.[23] And I would suggest that a more refined statement of the transfer of the subject's natural rights to the sovereign is required than Hobbes gave, if we are to avoid serious inconsistency in his theory.

The subjects inevitably do renounce something in any such transfer: each renounces a policy of first-strike violence and in this way renounces his natural right to do literally *anything* to preserve his life and substance. Hence, we would have to reject any claim to the effect that Hobbes believed natural rights to be incapable of restriction.[24] What the subject transfers to the sovereign is the former's right of striking first, each person doing so — "transferring" — with the intention that the sovereign will protect that particular individual's vital interests. But what each subject actually does is simply stand aside: "the transfer of a right can only mean that the transferor will stand aside from the exploitation of the other's [the sovereign's] pre-existing right."[25] It follows then that the subjects voluntarily allow for the sovereign to do anything, for this is his pre-existing right, that is, his natural right; and this jeopardizes (or could jeopardize) the vital interests of any one of them.

The position of Hobbes here, though it is not his language, is to say that the natural right of each to protect his vital interests has been waived; but this contention requires care. For when such a right is said to be waived it

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[22] In this regard Dalgarno distinguishes, as does Hobbes himself (*Leviathan,* ch. 14, p. 86), renunciation from transfer. For a transfer, unlike a renunciation, is always *to* someone in particular, intended or designated. See M. T. Dalgarno, "Analysing Hobbes's Contract," *Proceedings of the Aristotelian Society* 76 (1975-76): 209-26, esp. pp. 216-17; such transfers he calls "donational" (p. 220). So far as I can tell no contemporary writer conceives a renunciation of one's natural rights that is not explicitly, or in effect, a transfer of that which is renounced to the sovereign. See, for one example here, Orwin (1975, pp. 27, 29) who speaks of "abdicating" one's original or natural right "in favor of the sovereign" and, for another, T. E. Jessop who refers to a "surrender" of natural liberty but counts such surrendered liberty as transferred to the ruler. (See his *Thomas Hobbes* [London: Longmans, Green, 1960], p. 21).

[23] See Morton Kaplan, "How Sovereign is Hobbes' Sovereign?" *Western Political Quarterly* 9 (1956), 389-405, esp. pp. 397, 398.

[24] Thus I would take exception to Patrick Riley's remark (1973, p. 506) that "it is important to note that the concept of 'natural right' is never allowed by Hobbes to be restricted even by a man's own consent."

[25] At p. 425 in S. Beackon and A. Reeve, "The Benefits of Reasonable Conduct: The *Leviathan* Theory of Obligation," *Political Theory* 4 (1976): 423-38.

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has not been surrendered or renounced; rather, the right is retained but its exercise is forgone.[26] This waiving, for Hobbes, is permanent but conditional. That is, the right is held throughout; while the *exercise* of the right is extinguished permanently but conditionally — the condition here being the non-invasion of the subject's unmistakably vital interests by the sovereign.

It is plausible, then, and not inconsistent with Hobbes' basic theory to regard the invasion of the subject's vital interests, when what is at stake for him is "death, wounds, and imprisonment" at the hands of the sovereign, as the trigger for the subject's exercise of his natural rights. It is plausible and consistent, that is, so long as the subject's renunciation and transfer of his natural rights is construed as being merely their constant or perpetual conditional-waiving. And the ensuing conflict between sovereign and subject here is properly described as a conflict of natural rights.

But how is this any different from the anarchic state of nature from which Hobbes starts? It differs in two important respects. (1) Only the sovereign retains a policy of first-strike violence — a policy which the citizens as subjects have renounced for themselves, while allowing or permitting it for the sovereign. And (2) the citizen can resume a policy of violence against the sovereign *only* in the fact of an active threat to his life and limb.

Hence the Hobbesian doctrine of consent as standing aside requires one important modification. The sovereign is, respecting all the subjects, always in a state of nature towards each one of them; but they are individually not in a state of nature toward it or toward each other. Each can, however, resume a policy of violence against an active threat of violence to life and limb and, when resumed, the policy of violence could be as extensive as it was in the state of nature. It is, for all that, still not a policy of first-strike violence; for it does require the *initiation* of violence by some other person, namely the sovereign.

Nonetheless there does appear to be an incoherence in Hobbes' position. For he allows for an impasse between rights in the civil condition which can only be resolved by a partial reversion to the strategies of the state of nature. Hence there is in Hobbes' theory of civil association an unresolved residue of the state of nature. To the extent that Leviathan was intended to be "Lord of the Proud,"[27] disallowing all active resistance or dissent by his subjects to his sovereign will, Hobbes' theory is so far defective.

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[26] Here we touch upon a part, at least, of the classic question of the inalienability of natural rights. As I've tried to show, Hobbes holds, despite his talk of renunciation and transfer, that such rights are inalienable. The question of inalienability, as a general one and not just as regards Hobbes, has been the subject of several sophisticated recent studies. Note, in particular, B. A. Richards, "Inalienable Rights, Recent Criticism and Old Doctrine," *Philosophy and Phenomenological Research* 29 (1969): 391-404; Marvin Schiller, "Are There Any Inalienable Rights?" *Ethics* 79 (1969): 309-15; Judith J. Thomson, *Self-Defense and Rights,* The Lindley Lecture, 1976 (Lawrence: University of Kansas, Department of Philosophy, 1977); and Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy and Public Affairs* 7 (1978): 93-123. The main issues are summarized in R. Martin and J. W. Nickel, "Recent Work on the Concept of Rights," *American Philosophical Quarterly* 17 (1980): section 3.

[27] *Leviathan,* ch. 28, p. 209.

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